IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6223 OF 1999

Tatyasaheb Kore Warna
Sahakari Sakhar Karkhana
Ltd. ..Petitioner.

Vs.

1. The Commissioner of
State Excise and Ors. ..Respondents.

Mr.A.V.Bukhari with Mr.B.A.Bukhari for the Petitioner.

Mr.A.A.Kumbhakoni, Associate Advocate General with Mr.A.H.Patekar, A.P.P. for Respondent No.1.

CORAM: F.I. REBELLO AND
R.M. SAVANT, JJ.
DATED: 8TH MARCH, 2007.

ORAL JUDGMENT : (Per F.I.Rebello, J.)

. The Petitioner is a co-operative sugar factory duly incorporated under the provisions of Maharashtra Co-operative Societies Act, 1960. The Petitioners have a license to manufacture sugar. They have also licence to manufacture alcohol as a Bye product at their distillery plant.

2. It is the case of the Petitioners that since the Petitioners manufacture an excisable item, the State Excise Department of the Government of Maharashtra has established its independent office in the

Petitioner’s Distillery and an inspector has been appointed as incharge by the State Excise Department for levying of excise duty when applicable and for keeping the required register and records.The liquor distilled at the Distillery in fact for all purposes is under the physical control of the State Excise Department under a Distillery Officer and necessary staff is appointed for the supervision by Government at the cost of the Petitioner.

3. Excise duty on alcohol meant for human consumption is leviable under the provisions of The Bombay Prohibition Act, 1949 which hereinafter shall be referred to as the Act. The rules framed are known as the Maharashtra Distillation of Spirit and Manufacture of Portable liquor Rules, 1966 which hereinafter shall be referred as the "Portable Liquor Rules".

. Rule 2(d) of the Portable Liquor Rules defines the Distillery Officer as under :

> "Distillery Officer means a prohibition and excise officer appointed for the purpose of supervising the working of a Distillery;"

. Under Rule 2(1), "Manufacturing Officer" has been defined to mean as under :

> "Manufacturing Officer" means the Prohibition and Excise Officer appointed for the purpose of supervising the operation in a manufacture;

"Excise Supervision" under the Rules means :

> "Excise Supervision" means supervision over operations at a distillery or over manufacture of portable liquor in an manufacture by members of the staff of the Prohibition and Excise Department appointed in that behalf by the Commissioner or any other Prohibition Officer duly empowered by the State Government or Commissioner in that behalf;"

. It is therefore submitted on behalf of the Petitioners that the distillery is under the supervision of the Distillery Officer and Manufacturing Officer.

4. On 26.11.1992, Respondent No.2 issued a notice to the Petitioner demanding a payment of Rs.6,36,727.50 ps. on account of excise losses in storage of rectified spirit on the basis of audit objections raised by the internal audit party headed

by the Divisional Deputy Commissioner, State Excise, during the inspection for the period 11.10.1992 to 23.10.1992 which according to the petitioners was done without proper investigation and enquiry. The Petitioners submitted their reply vide letter dated 30.12.1992, explaining in detail the facts of the case. Various representations came to be made calling on the Respondents to consider the representation and write off the evaporation losses. As the Petitioners had to renew the licence, they had no choice but to deposit the entire amount. The Petitioners vide letter dated 29.3.1996 paid the said amount under protest.

5. Being aggrieved by the said demand notice dated 26.11.1992 the Petitioners preferred an Appeal to Respondent No.1. Various contentions were raised in the Appeal. It is not necessary for us to set out the same in extenso. Suffice it to say that by an order dated 5.7.1998 Respondent No.1 rejected the Appeal. It is this order which is the subject matter of the present petition.

6. On behalf of the Petitioners, their learned counsel has made the following submissions :-

(a) It is firstly submitted that considering Entry 51 of List II of the Seventh Schedule to the Constitution of India the Respondent State can charge excise only in respect of alcohol capable of human consumption. In the instant case, it was rectified spirit which in terms of the licence in their favour by addition of de-naturals was to be converted to industrial alcohol. Rectified spirit, it is submitted cannot be consumed by humans and that being the case, it was not subject to excise in the hands of the Respondent State.

(b) It is next submitted that even on facts the entire rectified alcohol was under the control and supervision of the officers of the Excise Department. The Petitioners had no control over the same. Any losses caused by the evaporation or otherwise, no recovery can be made from the Petitioners as there was no act on their part which caused the loss of alcohol. The learned counsel has relied upon the provisions of the Act, rules and the judgments of the Supreme Court, in support of his contentions which we will advert to, in the course of our discussion.

. On behalf of the Respondents, a reply has

been filed by Pratapsinh Damodar Golekar, Divisional Deputy Commissioner of State Excise, Nagpur Division, Nagpur. It is pointed out that under the Portable Liquor Rules, more specifically Rule 13, as also paragraph 21 of Form I to the said Rules, it was open to Respondent No.2 to have passed the order. The excise duty having been charged under the rules, it cannot be said that the action of the Respondents is without jurisdiction. It is alternatively submitted that the test would be whether the rectified spirit was capable of being used for human consumption and once that be so, it was open to the State to have made rules and/or charged excise on the losses caused by evaporation by giving a set off for the natural losses as set out in the rules.

7. It is this controversy which we are being called upon to decide. For that purpose, we may gainfully refer to some of the provisions of the Act.

Section 2(43) defines "spirit" to mean any liquor containing alcohol and obtained by distillation (whether it is denatured or not). Sub-section 2(37) defines "rectification" to include every process whereby liquor is purified or refined.

"Excisable article" is defined under Section 2(13) to mean amongst others, (a) any alcoholic liquor for human consumption, (b) an intoxicating drug, (c) opium.

Liquor has been defined under Section 2(24) to include ;

a) spirits, denatured spirits, wine, beer, toddy and all liquids consisting of or containing alcohol; and

b) any other intoxicating substance which the State Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act;

"Manufacture" has been defined under Section 2(25) to include ;

a) every process whether natural or artificial by which any liquor or intoxicating drug is produced, prepared or blended and also redistillation and every process for the rectification, flavouring, or colouring of liquor or intoxicating drug but does not

include flavouring, blending or colouring of liquor or intoxicating drug lawfully possessed for private consumption ; and

b) every process of producing and drowsing of toddy from trees;

We may then gainfully refer to Section 105 which reads as under :-

> "105. (1) An excise duty or countervailing duty, as the case may be, at such rate or rates as the State Government shall direct may be imposed either generally or for any specified local area on -
>
> (a) any alcoholic liquor for human consumption,
>
> (b) any intoxicating drug
>
> (c) opium,
>
> (d) any other excisable article,
>
> 2. Amendment of section 105 of Bom.XXV of 1949. - In section 105 of the Bombay Prohibition Act, 1949, (Bom.XXV of 1949) in sub-section (1), for the Explanation, the following Explanation shall be substituted, namely :-
>
> (i) according to the places to which an excisable article is to be removed for consumption ; or

(ii) according to the varying strengths or quality of such article ; or

(iii) according to the manufacturing cost of the excisable article, declared in writing, by the manufacturer or the exporter, to the State, to the prescribed authority and authenticated by the authority."

8. The State Government has framed The Bombay Denatured Spirit Rules, 1959. Rule 2(14) defines "spirit" to mean rectified spirit of not less than 66 O.P. strength, and includes absolute alcohol. "denatured spirit" means rectified spirit denatured in accordance with the process described in the Form D.S.I. by adding in it "ordinary denatured spirit" to mean spirit consisting of 100 parts of spirit and 1 part of light caoutchoucine or such other denaturant(s) as may be prescribed by the State Government from time to time. Under rule 4, any person desiring to denature spirit manufactured or stored by him under bond and sell such spirit shall apply to the Director for a licence for the denaturation of spirit and sale thereof by giving the particulars set out therein. Rule 2(g) defines "rectified spirit" to include absolute alcohol. Rule 4 sets out the procedure to process and renew the licence for rectified spirit and Rule 12 is an

embargo on the licensee to use the rectified spirit for industrial purposes except on the recommendation of the Director of Industries and in the manner and to the extent recommended by him.

9. From the definitions and the rules framed thereunder, the learned counsel for the Petitioner submits that it would be absolutely clear from Section 105 itself, that the power of the State Government to levy Excise Duty is only in respect of those items set out under Section 105. In the instant case, we are concerned with alcoholic liquor for human consumption. Our attention is invited to List II of the Seventh Schedule to point out that the State Government can only enact law in respect of Entries 8 and 51 of List II of the Seventh Schedule in respect of alcoholic liquors meant for human consumption. In other matters, it is Parliament alone which can enact legislation under entries 41, 52 and 84 of List I of the Seventh Schedule.

10. Before deciding the controversy, we may gainfully refer to the judgments cited at the bar. The learned counsel for the petitioner has relied upon the judgment of the Supreme Court in case of

Synthetics And Chemicals Ltd. & Ors. v. State of U.P. & Ors., (1990) 1 Supreme Court Cases, 109. The issue before the Constitution Bench of the Supreme Court was whether the levy of vend fee by the state government is justified in respect of industrial alcohol under different resolutions of each State and whether such a fee was valid. The Apex Court framed the following three questions :

(i) whether the power to levy excise duty in case of industrial alcohol was with the State legislature or the Central legislature ?

(ii) what is the scope and ambit of Entry 8 of List II of the Seventh Schedule of the Constitution ?

(iii) whether, the State Government has exclusive right or privilege of manufacturing, selling, distributing, etc. of alcohols including industrial alcohol. In this connection, the extent, scope and ambit of such right or privilege.

The Apex Court noted what was "rectified spirit" and for that purpose, gainful reference may be made to the observations in paragraph 14, which

read as under :-

> 14. It may be mentioned that rectified spirit is ethyl alcohol or ethanol with 96 per cent alcohol v/v. On dehydration, ethyl alcohol with 99.5 per cent volume of ethanol is produced. It was suggested that take over by the Dominion of the potable liquor industry was precluded by virtue of Entries 29 and 31 of List II read with Entry 34 of List I of the Government of India Act, 1935. It may be mentioned that the word 'industries' is the analogous provision in the State list under the Constitution of India, hence the meaning given to it in that list, must be applied. According to the petitioners/appellants, the expression 'industries' has been given a restricted meaning so as not to entrench on the State's power with respect to other industries specifically assigned to the State under other entries in the State list. See *Calcutta Gas Co. v. State of West Bengal."*

. One of the questions posed was whether intoxicated liquor in Form A in List II is confined to portable liquor or includes all liquors. The Supreme Court noted that it is well to remember that a meaning of the expression used in the Constitution must be found from the language used and that the Court should interpret the words of the Constitution on the same principles of interpretation as one

applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not (sic) to rob it of entire content.

. We may gainfully reproduce the following part of paragraph 74 :

> 74. It has to be borne in mind that by common standards ethyl alcohol (which has 95 per cent) is an industrial alcohol and is not fit for human consumption. The petitioners and the appellants were manufacturing ethyl alcohol (95 per cent) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverage and industrial alcohols are clearly and differently treated. Rectified spirit for

> industrial purposes is defined as "spirit purified by distillation having a strength not less than 95 per cent of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95 per cent) is an industrial alcohol and is not potable as such. It appears, therefore, that industrial alcohol which is ethyl alcohol (95 per cent) by itself is not only non-potable but is highly toxic. The range of spirits of potable alcohol is from country spirit to whisky and the ethyl alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. In other words, ethyl alcohol (95 per cent) is not alcoholic liquor for human consumption but can be used as raw material input after processing and substantial dilution in the production of whisky, gin, country liquor, etc. In many decisions, it was held that rectified spirit is not alcohol fit for human consumption."

. From this paragraph, it would be clear that by common standards ethyl alcohol (95 per cent) is not alcoholic liquor for human consumption but can be used as a raw material input after processing and substantial dilution in the percentage of potable liquor.

. It would thus be clear from the ennunciation of law by the Supreme Court that ethyl alcohol by

itself is not potable or meant for human consumption, unless processed and substantially diluted.

Oza, J. in his concurring judgment, observed thus :

> "97. A comparison of the language of these two entries clearly demonstrates that the powers of taxation on alcoholic liquors have been based on the way in which they are used as admittedly alcoholic liquors is a very wide term and may include variety of types of alcoholic liquors but our Constitution makers distributed them into two heads:
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> (a) for human consumption
>
> (b) other than for human consumption.
>
> Alcoholic liquors which are for human consumption were put in Entry 51 List II authorising the State legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the central legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in Lists I and II is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has been put within the authority of the State for purposes of taxation."

> "101. Under these circumstances therefore it is clear that the State legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre."
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> "110. In our opinion, therefore so far as the present case is concerned the State in exercise of powers under Entry 8 of List II and by appropriate law regulate and that regulation could be to prevent the conversion of alcoholic liquors for industrial use to one for human consumption and for purpose of regulation, the regulatory fees only could be justified. In fact, the regulation should be the main purpose, the fee or earning out of it has to be incidental and that is why the learned counsel appearing for the State attempted to use this terminology by saying that the purpose is regulation, the earnings are incidental but frankly conceded that in fact the earnings are substantial."

11. The issue thereafter once again came before the Supreme Court in **State of U.P. & Ors. v. Modi Distillery & Ors., (1995) 5 Supreme Court Cases, 753**. The Supreme Court in paragraph 9 once again reiterated that the expression used in the Constitution is "alcoholic liquors for human consumption", and the expression still means, liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as

a beverage or drink. The State had sought to levy excise duty on the wastage of liquor after distillation, but before dilution; and, in another group of cases, the pipeline loss of liquor during the process of manufacture, before dilution, the court observed :

> "10..... It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowerd to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."

. Gainful reference can also be made to paragraph 11 as under :-

> "11. That the measure of excise duty upon alcoholic liquor for human consumption is the alcoholic strength thereof does not make any difference in this behalf. It is only the alcoholic strength of the final product which is relevant."

12. The learned Assistant Advocate General has drawn our attention to the judgment in **Bihar Distillery & Anr. v. Union of India & Ors., (1997)**

2 Supreme Court Cases, 727 where it appears, a different interpretation was sought to be given. This was noted by another Division Bench of the Supreme Court in **Deccan Sugar & Abkari Co. Ltd. v. Commissioner of Excise, Ap Co. Ltd., 1998-(003)-SCC-0272-SC.** The Court held that the decision in Bihar Distillery (supra) runs counter to the judgment in Modi Distillery as examined by the Constitution Bench of this Court in **Synthetics And Chemicals Ltd.** (supra) and **State of U.P. & Ors. v. Modi Distillery & Ors.** (supra) and, accordingly, referred the matter to be considered by the larger Bench. The decision of the larger Bench is reported in **Deccan Sugar & Abkari Co. Ltd. v. Commissioner of Excise, A.P., (2004) 1 Supreme Court Cases, 243**. We may only reproduce paragraphs 2 and 3 as follows :

> "2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd. Vs. State of U.P. that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. Vs. State of U.P.

> has been followed in State of U.P. v. Modi Distillery where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd. came to the conclusion that this cannot be done.
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> 3. In the present case also, the aforequoted passage from the Excise Commissioner's order indicates that the duty is sought to be levied on the loss of rectified spirit amounting to 6,18,842 litres. We have already observed that no duty can be levied by the State on the rectified spirit and, therefore, the impugned order of the Commissioner of Excise is set aside. This appeal is allowed accordingly."

. The learned Advocate General however contended that the decision in **Deccan Sugar & Abkari Co. Ltd.** (supra) did not expressly overrule the judgment in **Bihar Distillery & Anr.** (supra). It may be mentioned that though **Deccan Sugar** is reported in the year 2004, it was decided on February 13, 2002. Our attention was invited to the judgment of the Supreme Court in **State of U.P. & Ors. v. Vam Organic Chemicals Ltd. & Ors., AIR 2003, Supreme Court, 4650**. We may only refer to paragraphs 26, 27 and 28 of the said judgment :

> "26. The larger Bench followed

Synthetics and Modi Distillery without expressly over-ruling the decision in Bihar Distillery. We, therefore, proceed on the basis that the decision in Synthetics continues to exclude the State from levying tax on industrial alcohol whether or not it has the potential to be used as alcoholic liquor.

27. However Synthetics has also said ".....the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol."

In summing up the law the Constitution Bench said:

"The position with regard to the control of alcohol industry has undergone

material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

. (a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.

. (b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

. (c) The State may change excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be

charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.

. (d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case (1971 (2) SCC 236).

28. The State’s power is thus limited to (i) the regulation of non-potable alcohol for the limited purpose of preventing its use as alcoholic liquor; and (ii) the charging of fees based on quid pro quo. The question then is -- is levy under R.3(a) of the 1976 Rules justifiable as such fee ?"

12. From the above discussion, we have no hesitation in holding that the law is no longer res-integra and the competence of the State legistature to levy excise duty is only on alcoholic liquor meant for human consumption. Admittedly, in the instant case, we are dealing with "rectified spirit" which cannot be consumed by humans. That spirit by addition of denaturals, is processed into industrial alcohol, which item is subject to excise duty only by an act of the Parliament. The first contention therefore must be accepted.

13. In so far as the second contention is concerned, we have earlier referred to the various rules which require that after liquor is distilled, it must be kept in a separate room called spirit room which is under lock and key of the officers of the Respondents and if the manufacturer wants to remove the spirit from the said spirit room it can only be under due permission, after filling in the requisite forms as framed under the rules. The entire exercise of converting the spirit into industrial alcohol can only be done by the Petitioners with the permission of the Respondents and on the Respondents releasing necessary quantity

of alcohol for that purpose. It is no doubt true that the rules referred to and the forms would confer power on the Respondents to charge excise duty. But, once we hold that it is not within the competence of the State to make any law in respect of alcohol other than meant for human consumption, the rules and forms to that extent will have to be held to be ultra-vires the constitution, considering both Section 105 of the Excise Act and the competence of the State, considering Entry 51 of List II of the Seventh Schedule.

14. In the light of the aforesaid, the demand in the sum of Rs.6,39,820.70 ps. and the further demand in the sum of Rs.2,71,361.60 ps. are set aside and quashed. Rule is also made absolute in terms of prayer causes (a), (a-1), (a-2) as also prayer clause (b) but with interest at the rate of 8% till payment. In the circumstances of the case, there shall be no order as to costs. The amount to be paid to the Petitioners within 8 weeks from today.

15. The learned Associate Advocate General applies for the stay of operation of the judgement. In our opinion, there is no question of stay, considering

the issue, has been concluded by the judgments of the Supreme Court.

. Hence, the application for the stay is rejected.

(R.M. SAVANT, J.) **(F.I. REBELLO, J.)**